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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-5125

DUNCAN PEDER McKENZIE, JR.,

Petitioner,

-against-

STATE OF MONTANA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF MONTANA

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QUESTIONS PRESENTED

1. Whether a jury instruction which unconstitutionally shifted to petitioner the burden of proof on an element of the crime could ever be deemed "harmless error" in a capital case?

2. Whether the court below employed the proper standard in determining that the jury instructions given in this case were harmless?

3. Whether the imposition and carrying out of the sentence of death by hanging for the crimes of deliberate homicide and aggravated kidnaping under the law of Montana in force at the time of petitioner's trial violate petitioner's rights under the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States?

4. Whether the failure of the courts below to enforce a plea bargaining agreement between petitioner, the State and the trial court, on which petitioner's trial counsel had relied in revealing petitioner's trial strategy and tactics to the State prior to trial, deprived petitioner of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States?

5. Whether the introduction at trial of evidence seized from petitioner's dwelling place and truck parked outside his dwelling place pursuant to a search warrant violated his rights under the Fourth and Fourteenth Amendments to the Constitution of the United States?

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PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF MONTANA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Montana entered February 26, 1980.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Montana, which is reported at 608 P.2d 428 (Mont. 1980), is annexed as Appendix A. The two prior opinions of the Supreme Court of Montana, reported at 581 P.2d 1205 (Mont. 1978) and 557 P.2d 1023 (Mont. 1976), are annexed as Appendices B and C, respectively.

JURISDICTION

The judgment of the Supreme Court of Montana, which is annexed as Appendix D, was entered February 26, 1980. On March 31, 1980, that court denied a timely rehearing petition in an order annexed as Appendix E. On June 11, 1980, this Court granted a timely application to extend the time for filing this

petition to and including July 28, 1980. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States and various sections of the Montana Revised Code Annotated as set forth in Appendix F.

STATEMENT OF THE CASE

Procedural History

This is a petition for a writ of certiorari to review the judgment of the Supreme Court of Montana, entered on February 26, 1980. Petitioner, Duncan Peder McKenzie, Jr., was convicted on February 1, 1975, of deliberate homicide and aggravated kidnaping after a jury trial in the District Court of the Eighth Judicial Circuit in and for the County of Cascade, Montana. He was sentenced by the trial court to be hanged. The Montana Supreme Court affirmed, State v. McKenzie I, 557 P.2d 1023 (Mont. 1976) and on petition for certiorari, this Court vacated the judgment and remanded "for further consideration in light of Patterson v. New York, 432 U.S. 197 (1977)," McKenzie v. Montana, 433 U.S. 905 (1977).

On remand, the Montana Supreme Court adhered to its original decision, State v. McKenzie II, 581 P.2d 1205 (Mont. 1978).

Following the filing of a second petition for certiorari, this Court again vacated the judgment and remanded "for further consideration in light of Sandstrom v. Montana, 442 U.S. 510 (1979)," 443 U.S. 903 (1979). On remand, the Montana Supreme Court once again affirmed. State v. McKenzie III, 608 P.2d 428 (Mont. 1980).

The Crime and the Investigation

Ms. Lana Harding, the victim of the kidnaping and murder, was last seen alive about 5:00 p.m., January 21, 1974, in Conrad, Montana, 13 miles from the living unit (or "teacherage") near the rural public schoolhouse where she taught, T. 1630, 2156, 2158.[1/] When she failed to appear at school the next morning the county sheriff was notified, T. 473. The sheriff and deputies came to the teacherage and searched the premises. This search produced: a red tennis shoe found outside the door of the teacherage, T. 1635; some scuff marks, two mats out of place, and a pair of glasses found inside the teacherage, Deposition of Deputy Jerry Hoover, Ct. File Item 30, at p. 6; what appeared to be a "drag trail" leading out of the teacherage, under a fence, up to the road in front, ibid., T. 2125; and a spot of what appeared to be blood near the end of the trail by the road, with a woman's watch nearby. T. 900-901, 2018. Officers spoke to Dan Pearson, a

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1/ References to pages of the trial transcript will hereinafter be preceded by "T.", and references to documents contained in the "Court File" record in the Montana Supreme Court will be preceded by "Ct. File Item."

neighbor of Ms. Harding's who lived across the road from the teacherage. Mr. Pearson told the officers that the previous evening, a man had come to his door and had asked for help in starting his pick-up truck. This man, who Pearson characterized as "nervous" and who identified himself as Duncan McKenzie, had phoned his wife from Pearson's house. T. 2010. The two men then had gone to the truck, which was parked near where the officers later found the watch and apparent blood stain, and had started the truck. T. 216-217; Deposition of Justice of the Peace Robert Wolfe, Ct. File Item 30, at pp. 6-7.

Pondera County Attorney David Nelson came out to the teacherage later during that afternoon and talked to law enforcement officers including Deputy Jerry Hoover, who had been involved in the search, T. 2015. The two men returned to Conrad late in the afternoon, T. 2016, where Nelson executed an "affidavit" [2/] reciting the facts then known to the investigators, and drafted a criminal complaint charging petitioner with a misdemeanor assault upon Lana Harding. Ct. File Item 60. Nelson explained to Justice of the Peace Robert Wolfe what he had learned. The Justice of the Peace placed Deputy Hoover under oath and asked him a few questions. No court reporter was present, and no contemporaneous record was made of Hoover's testimony. [3/] Ibid.

2/ This "Affidavit" is reproduced in the dissenting opinion of Justice Shea in State v. McKenzie II , supra, 581 P.2d at 1240-41.

3/ According to Wolfe's testimony, Hoover told him of Ms. Harding's disappearance, the scuff marks on the floor of her house, the other items "out of place" there, the tennis shoe found outside her door, the "drag marks" leading up to the road, the presence near the road of a woman's watch and something

(cont'd.)

At the conclusion of these proceedings, Justice of the Peace Wolfe signed warrants for petitioner's arrest and for the search of his "residence . . . and the surrounding [curtilage] area" and of "a 1950 black Dodge Pickup truck there." The search warrant authorized seizure of several items of clothing "worn by the Defendant," of several other items of woman's clothing, "and any other controband [sic] articles." Ct. File Item 76.

Pursuant to these warrants, County Attorney Nelson, the Sheriff, and several of his deputies went to the petitioner's residence at around 7:00 p.m. the same evening, T. 2017-2018, arrested petitioner, and began a four hour search. The officers searched petitioner's house, confiscating several items of clothing, T. 2022, and they took pubic and head hairs from petitioner. The pick-up was seized with all its contents, taken to a garage in Conrad and searched the next day. T. 736, 740.

Ms. Harding's partially nude body was found on January 23 a few miles from the teacherage, T. 467-468, 1979, clothed in a blouse, sweater, and bra, with a number of severe head wounds, T. 562, and a rope twisted about the neck, T.553,585-586. 4/

3/ cont'd.

that "looked like it was blood," and the encounter Dan Pearson had had the night before with petitioner. Deposition of Justice of the Peace Robert Wolfe, Ct. File Item 30, at pp. 5-8. See pp. 49-53, infra.

4/ Other items ultimately introduced in evidence were discovered in farm fields several miles from the teacherage or at the site where the body was discovered: a pair of leather work gloves with what appeared to be specks of blood on them, T. 897, a pair of rubber men's overshoes, T. 2140, and a woman's purse, T. 2147.

On January 24, 1974, petitioner was charged by information with the deliberate homicide of Lana Harding. Ct. File Item 4.[5] On December 3, 1974, venue of the trial was changed to Cascade County, Montana, T.3, and several motions by appointed defense counsel -- including a motion to suppress the evidence seized from petitioner's house and truck, T.2 -- were denied.[6] On December 17, 1974, the trial court entered for petitioner a plea of "not guilty", T. 19, to two counts of deliberate homicide, two counts of aggravated kidnaping, one count of sexual intercourse without consent, and two counts of aggravated assault charged in the third amended information.[7]

The Plea Bargain

Within a few days of the entry of petitioner's plea, counsel for the defense and state engaged in plea bargaining discussions which culminated in an agreement that petitioner would be allowed to plead guilty to deliberate homicide and aggravated assault and that the State would waive the death penalty. Affidavit of Barney Reagan, Esq., Ct. File Item 99, at p.2. On

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5/ During the next eight months, three "Amended Informations" were filed by the State. Ct. File Items 16, 33, 74.

6/ The order denying the motion to suppress, Ct. File Item 90, contained no findings or conclusions and did not specify the grounds on which the searches were sustained. Petitioner sought but could not obtain such findings from the court. T. 13-14.

7/ The two homicide and two kidnaping counts charged a single instance of homicide and kidnaping respectively, but alleged different methods of commission. See Ct. File Item 74.

December 23, the trial judge, Hon. R. J. Nelson, agreed to accept the pleas, with a slight modification in the sentencing agreement. Ibid. But on December 28, 1974, -- after defense counsel had disclosed his trial strategy in reliance on the plea agreement in order to assist the prosecution in justifying the plea to the community and the victim's family, id. at 3-4 -- the State announced it was abrogating the agreement because of objections voiced by Ms. Harding's family, id. at 3-4.

Over defense objections, the trial court ruled that the case would proceed to trial, T. 6 (December 30, 1974), and permitted the State to endorse fifty-eight new witnesses on the day of trial. Ct. File Item 113; T. 80-81, 88, 91. The defense claimed these witnesses were called to counter the trial strategy defense counsel had revealed in reliance on the broken plea bargain agreement. Defendant's Objections, Ct. File Item 114, at p.2.

The Trial

The trial judge opened the trial with extensive "preliminary instructions" on matters of law. T. 453. These instructions included a recitation of "at least seventeen alternative ways" State v. McKenzie III, supra, 608 P.2d at 470 (Shea, J. dissenting) in which the State had charged that the crimes might be proven.

During the trial which followed, the State sought to link petitioner to Ms. Harding's death primarily through (i) the testimony of Dan Pearson, T. 2160-2175, and Pearson's father, Gundar, T. 2148-2155, that petitioner had sought assistance in starting his stalled truck near the teacherage the evening of January 21,

and (ii) through the introduction of physical evidence[8] -- much of it seized from petitioner's truck and house[9] -- which tended to indicate petitioner's involvement in her abduction.[10] The

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8/ The order of the State's presentation was significantly altered from the chronological sequence of events due to the introduction of voluminous testimony concerning the chains of custody over the various items introduced. See, e.g., 474-487, 521-527, 634-637, 646-657, 670-685, 699-717, 767-777, 805-825, 956-972, 1095-1108, 1469-1538, 1919-1955. Establishing the chain of custody with respect to various evidentiary items had been a primary weakness in the State's case perceived by defense counsel and revealed by them to the State in reliance on the subsequently abrogated plea agreement.

9/ Two items taken from petitioner's house were introduced into evidence against him, T. 1062, 2091: a pair of boots, T. 778-779, with a small trace of blood on one of them, T. 1035, the soles of which were similar to prints inside overshoes found discarded in a farm field about two miles from the teacherage, T. 897, with blood and brain tissue on them, T. 1061-1062; and a shirt belonging to petitioner which also had untypeable human blood on it, T. 1205. A number of objects and samples taken from petitioner's truck were also introduced into evidence: an exhaust manifold, T. 1949, similar to the instrument which could have inflicted the fatal wounds on Ms. Harding, T. 1397, which had type O blood, T. 1117, brain tissue, T. 1395, and hair similar to Ms. Harding's, T. 1298, under fresh paint on it; a coil of wire, part of which matched a piece of wire found in Ms. Harding's hair, T. 1126; several scrapings from parts of the truck, T. 970, 976-979, which contained type O blood, T. 1188-1192, and sweepings which contained hairs which were microscopically similar to Ms. Harding's, T. 1294-1296, 1307, 1381, and a number of hardware items from the bed of the truck, see, e.g., T. 1872, 1877, 1878, 1935, 1946, with blood, sometimes identifiable as type O, on them, see, e.g., T. 1095-1097, 1103-1112, 1141.

10/ In addition to the items seized from petitioner pursuant to the warrants, the State offered several other items of physical evidence and scientific testimony about them tending to link petitioner to the crime. Most significantly, it showed that petitioner's blood was "O" positive and that he was a "secretor" (i.e., that his blood type could be determined from his saliva or semen) T. 619. The semen found in Ms. Harding's pubic hair, T. 613, the tests revealed, had come from a male with "O" type blood. A pair of gloves was found discarded, T. 897, in the same general area where Ms. Harding's purse and the pair of overshoes with human blood on them, T. 1032, were also found, T. 2140, 2147, and these gloves were similar to work gloves petitioner had been seen wearing, T. 1749. The gloves had stains on them similar in color to the "Red Top" seed treat used at the seed store where petitioner worked, T. 1155.

State also offered testimony from two of petitioner's co-workers that he had made statements indicating a sexual interest in "country school teachers" in general, T. 2054, and Ms. Harding in particular, T. 1897.

Petitioner, who had a prior conviction for assaulting a woman, T. 2615, did not testify.[11] While he challenged the persuasiveness of the State's evidence to prove the elements of the offenses charged[12] and also sought to demonstrate that some of this evidence may have been tampered with,[13] most of petitioner's

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11/ Petitioner initially refused to enter a plea of "not guilty by reason of mental disease or defect excluding responsibility" or to give the statutorily required notice of such a defense. He claimed that the 1973 Montana Criminal Code's "mental disease or defect" provisions were unconstitutional because (1) they placed upon petitioner the burden of establishing the affirmative defense of mental incompetence by a preponderance of the evidence, and (2) they placed upon petitioner the burden of controverting the assumption that he possessed the requisite mental elements for deliberate homicide, once the State had established an illegal killing had been committed. Petitioner refused to give the statutorily required notice for fear of waiving his constitutional objection to the "mental disease or defect" rules. See Ct. File Items 24, 27, 28, 37, 40.

12/ See, e.g., T. 593, 602, 1444, 1455, 1233-1276, 2338-2378.

13/ Defense witnesses testified that, after petitioner had been taken into custody, Ms. Harding's purse had not been found on the night of January 22 in a careful search of the area where it was subsequently found January 23, T. 2218, and that the pickup truck from which so many crucial items of evidence had been taken had, for a time at least, been left unguarded after it was seized and thus could have been tampered with, T. 2231.

own evidence was addressed to the question of whether he could have acted "knowingly" or "purposely" in the commission of a homicide. The trial court construed petitioner's defense as that of "mental disease or defect excluding responsibility." T. 1427-1435. A psychiatrist appointed to examine petitioner, Dr. Robert Wetzler, testified that petitioner was a "schizoid personality," T. 2248, who was unable to form the requisite mental elements of deliberate homicide and aggravated kidnaping, who was unable to appreciate the criminality of his conduct, and who was unable to conform his conduct to the requirements of law, T. 2248, 2321.

In rebuttal, the State introduced the testimony of another psychiatrist who had examined petitioner, Dr. Miguel F. Gracia, who testified that petitioner possessed a "passive-aggressive personality" and "social maladjustments," T.2396, but that he was not afflicted with a "mental disease" and could appreciate the criminality of his conduct, T. 2397.[14/] A state psychologist testified concerning his "diagnostic impression", on the basis of testing, that that petitioner had a "personality disorder", T. 2559, but that he could appreciate the criminality of his conduct and conform it to law, T. 2547.

14/ Dr. Gracia based this conclusion partially on his observations of petitioner's "thought content" in refusing, on the advice of his attorney, to discuss the crime with which he was charged, T. 2400. Dr. Gracia concluded that this refusal was "rationalization." Other "symptoms" which Dr. Gracia cited in support of his diagnosis that petitioner possessed merely a "personality disorder" were "insecurity," T. 2409, "hostility," T. 2411, and suppressed anger, T. 2413-2414.

Over petitioner's repeated objections, the trial court gave numerous instructions to the jury at the close of the evidence which permitted or directed them to presume intent from other elements. "The unconstitutional Sandstrom-type presumptions permeate the instructions given to the jury in this case." McKenzie III, 608 P.2d at 470 (Shea, J., dissenting). See Add. Instr. 31, 33, 37, 38, Ct. File Item 154. For example, the jury was instructed concerning deliberate homicide as follows: "[T]he law presumes that an unlawful act was done with an unlawful intent; that is, the law expressly directs you to reason from such unlawful act that the defendant acted with an unlawful intent or purpose. This is a rebuttable presumption, which means it may be controverted and overcome by other evidence, but whether or not a presumption, once it has come into effect, is overcome, is for the jury to determine." Add. Instr. 33, Ct. File Item 154. 15/

Six possible verdicts were submitted to the jury on at least seventeen alternative theories. The jury found petitioner guilty of "Deliberate Homicide by Means of Torture," and "Aggravated Kidnaping", accompanied by the death of the victim, without specifying which of the alternative theories charged it relied upon. T. 2605.

15/ The entire set of preliminary and post-trial instructions submitted to petitioner's trial jury is annexed as Appendix G.

The trial court ordered the preparation of a pre-sentence investigation report and held a sentencing hearing on March 3, 1975, sitting without a jury, as required by Montana law. In written "Findings, Conclusions, Sentence and Order," Ct. File Item 169; attached infra as Appendix H, the trial court stated that "[t]he evidence in the case, and as found by the jury discloses a brutal, conscienceless torture, rape and deliberate killing of a human being," id. at 7; that petitioner could distinguish right from wrong but was "dangerous and potentially dangerous",ibid.; that he had previously been convicted of an aggravated assault on a woman and that the chances of his rehabiltation were "practically nonexistent," id. at 8, and that under Montana law "he would only be required to service [sic] approximately seven years . . . before he would be turned loose to menace society again," id. at 9. The trial court found that "there are no circumstances which mitigate the defendant's conduct or the sentence to be imposed," ibid., and sentenced petitioner to be hanged for deliberate homicide and aggravated kidnaping. 16/

16/ Petitioner was not sentenced separately for these two crimes. The trial court concluded that "[t]he offenses of which the defendant had been found guilty are of equal gravity before the law and result from the same transaction, and therefore only one sentence may be imposed though he was found guilty of two offenses." Findings, Conclusions, Sentence and Order, Ct. File Item 169, at p.9.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

I. & II. During trial, petitioner filed a written "Motion to Require Proof of Ability to Have a Particular Mental State" Ct. File Item 143 and submitted a proposed instruction that "the State must prove that Defendant had the necessary state of mind to have acted . . . either 'knowingly' or 'purposely' beyond a reasonable doubt," Defendant's Instruction No. 13, Ct. File Item 153. The trial court denied this Motion and refused the instruction. T. 2208, 2595-2599.

Petitioner also expressly objected to "the proposition that presumption can furnish intent or proof of intent or take the place of proof of intent. Object to them being included in these Instructions, in these two instances or any place else in the Instructions, in that they permit specific intent in such a case as this to be proved whole . . . rely on presumption,[sic] and this is violative of the defendant's due process . . . rights, as provided by Federal and State Constitutions." T. 2599-2600. The trial court overruled the objection and gave the instructions. On appeal, petitioner's Specification of Error No. 19 raised this issue in the Montana Supreme Court, Brief of Appellant at 364-369, which twice rejected the contention. State v. McKenzie I, supra, 557 P.2d at 1043; State v. McKenzie II, supra, 581 P.2d at 1222.

On his second remand to the Montana Supreme Court from this Court, petitioner contended that the presumptions on which his jury was instructed were unconstitutional, that "[a]ny constitutional error that effects the 'substantial rights' of a defendant can never be harmless beyond a reasonable doubt," Appellant's Brief, September 13, 1979, at 14, and that "[t]he supplying of proof of an element of an offense, by use of a presumption, must absolutely [affect] the substantial rights of a defendant" id. On the question of the proper harmless error standard, petitioner contended that under this Court's prior rulings, "the question [is] ' . . . whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction," id. at 11.

The Montana court did not expressly consider whether the constitutional error in instructing petitioner's trial jury might require automatic reversal. Concerning harmless error, the court stated that "[a]s far as we can determine, the United States has not yet fashioned a uniform standard for determining harmless federal constitutional error," and that consequently "we feel free to adopt any of the three standards" derived from prior cases. State v. McKenzie III, supra, 608 P.2d at 458. Applying an "overwhelming weight of the evidence standard," the court held that the "evidence on the issue of intent is overwhelming," id. at 459. The Montana Court made no effort to determine whether the unconstitutional instruction may have contributed to the verdict.

III. Petitioner filed a Petition and Motion in Mitigation, in the trial court, Ct. File Item 162, urging that the 1973 Montana death penalty statute was unconstitutional under "the rule expressed in Furman v. Georgia," and under the Eighth Amendment to the Constitution of the United States, id. at 1, 4, and he moved the trial court "[t]o not impose a sentence of death," id. at 5.

On appeal, petitioner's Specification of Error No. 25 alleged that petitioner's sentence of death was imposed in violation of the "Fifth, Sixth, Eighth, Ninth & Fourteenth" Amendments to the Constitution of the United States, Brief of Appellant at 466, and the Montana Supreme Court twice rejected this contention. State v. McKenzie I, supra, 557 P.2d at 1028-1034; State v. McKenzie II, supra, 581 P.2d at 1229. In its third affirmance of his convictions and sentences, the Montana court expressly held after a brief analysis "that the death penalty statutes in question in this case are constitutional under the United States constitutional requirements." State v. McKenzie III, 608 P.2d 428, 451 (Mont. 1979).

IV. On January 3, 1975, before trial, petitioner filed a "Motion to Enforce Agreement of December 23, 1974," Ct. File Item 104, which contended that failure to enforce a plea bargaining agreement deprived petitioner of "due process of the law under the United States . . . Constitutio[n]," id. at 3. This motion was denied, T. 60.

On appeal, petitioner's Specification of Error No. 2 alleged this refusal to enforce the agreement as error. The

Montana Supreme Court twice rejected this contention. State v. McKenzie I, supra, 557 P.2d at 1038; State v. McKenzie II, supra, 581 P.2d at 1214. In its third affirmance, the Montana court, after reconsidering the claim, held that that "Santobello v. New York,(1971), 404 U.S. 257, . . . is clearly distinguishable on the facts and on the law." State v. McKenzie III, supra, 608 P.2d at 439.

V. Prior to trial, petitioner moved to suppress items seized from his house and truck on the ground that they had been seized in violation of his rights under the Fourth Amendment to the Constitution of the United States, Ct. File Item 50. The trial court entered an order denying this motion, Ct. File Item 90.

On appeal, petitioner's Specification of Error No. 1 alleged the denial of this motion as error. The Montana Supreme Court twice rejected petitioner's claim. State v. McKenzie I, supra, 557 P.2d at 1034; see also State v. McKenzie II, supra, 581 P.2d at 1211, 1213. In its third affirmance, the Montana court held that "'only a probability of criminal conduct need be shown'" for a search warrant and that "items other than those specifically described in [a] search warrant may be seized so long as a reasonable relationship is demonstrated between the search authorized . . . and seizure of the items not specifically described therein." State v. McKenzie III, supra, 608 P.2d at 437-38.

REASONS FOR GRANTING THE WRIT

I.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER A JURY INSTRUCTION WHICH SHIFTS TO PETITIONER THE BURDEN OF PROOF ON AN ELEMENT OF THE CRIME, IN VIOLATION OF SANDSTROM v. MONTANA, 442 U.S. 510 (1979), CAN EVER BE DEEMED "HARMLESS ERROR" IN A CAPITAL CASE.

In Chapman v. California, 386 U.S. 18 (1967), the case in which it first accepted the doctrine of harmless constitutional error, this Court carefully emphasized its intention "not to treat as harmless those constitutional errors that 'affect substantial rights' of a party," Chapman v. California, supra, 386 U.S. at 23. The Court expressly noted that "our prior cases have indicated that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error," id., citing Payne v. Arkansas, 356 U.S. 560 (1958)(coerced confession); Gideon v. Wainwright, 372 U.S. 335 (1963)(right to counsel); Tumey v. Ohio, 273 U.S. 510 (1927) (impartial judge).

Subsequently, the Court has reaffirmed its recognition in Chapman that since certain constitutional rights are "too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from [their] denial," Glasser v. United States, 315 U.S. 60, 75-76 (1942) and that the doctrine of harmless constitutional error therefore is inapplicable to errors which infringe upon those rights. See, e.g., Harrington v. California, 395 U.S. 250, 251-52 (1969); Holloway v. Arkansas, 435 U.S. 475, 488-89 (1978); cf. Smith v. Illinois, 390 U.S. 129, 131 (1968); Davis v. Georgia, 429 U.S. 122 (1976).

In Chapman itself, the Court's designation of the rights (i) to an impartial judge (ii) to the assistance of counsel and (iii) to a trial free from use by the State of involuntary confessions as among those "so basic to a fair trial" that they may never be treated as harmless suggested a standard for identification of those errors requiring automatic reversal which emphasized, not the likely impairment of the factfinding process, but rather the damage to the integrity of the proceedings. On the other hand, the discussion in Holloway on why conflicts of counsel can never be deemed harmless dwelt upon the virtual impossibility of "assess[ing] the impact of a conflict of interests on the attorney's options, tactics, and decisions" on behalf of his client, Holloway v. Arkansas, supra, 435 U.S. at 491, implying that the application of the automatic reversal rule may be governed by the difficulty of ascertaining the prejudicial effects of certain kinds of constitutional error. The Court in fact has never clearly articulated the principles for determining whether a particular constitutional error requires automatic reversal, nor has the Court offered a complete roster of such errors.

Whether an unconstitutional jury instruction on a disputed element of the crime is among those fundamental errors which may never be treated as harmless is a question reserved in Sandstrom v. Montana, 442 U.S. 510, 526-27 (1979). The Court in Sandstrom held that to have instructed the petitioner's jury that "the law presumes that a person intends the ordinary consequences of his voluntary acts," in a case where intent was a disputed element of the crime, "'conflict[ed] with the overriding presumption of innocence with which the law endows the

accused and which extends to every element of the crime'" Sandstrom v. Montana, supra, 442 U.S. at 523, and "had the effect of relieving the State of the burden of proof . . . on the critical question of petitioner's state of mind," id. at 521.

This case poses directly the question reserved in Sandstrom, for petitioner's trial jury here was repeatedly given instructions virtually identical to those condemned in that case[17/] despite the fact that his principal defense to the charges against him, on which he offered significant evidence,

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17/ The instruction identified as unconstitutional in Sandstrom stated "that '[t]he law presumes that a person intends the ordinary consequences of his voluntary acts,'" Sandstrom v. Montana, supra, 442 U.S. at 513. In petitioner's case, the jury was repeatedly instructed on the mental element necessary to constitute deliberate homicide, in the following terms:

> "[T]he law presumes that an unlawful act was done with an unlawful intent; that is, the law expressly directs you to reason from such unlawful act that the defendant acted with an unlawful intent, or purpose.
>
> * * *
>
> The law also presumes that a person intends the ordinary consequences of his voluntary act.
>
> Therefore, if you find beyond a reasonable doubt that the defendant . . . voluntarily and unlawfully assaulted or injured Laura Harding, and if you further find beyond a reasonable doubt that the death would result as the ordinary consequence of such an assault or injury, the law presumes that, and expressly directs you to reason therefrom that the defendant intended to cause said death regardless of whether or not he actually had such an intent or purpose."

Add. Instr. 37; Ct. File Item No. 154. See also Add. Instr. 31, 35; Ct. File Item No. 154, all in Appendix G annexed.

was his lack of intent.[18/]

The constitutional violation in petitioner's case is therefore clear, and the right infringed is basic. This Court has described the presumption of innocence as "that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the very foundation of the administration of our criminal law,'" In re Winship, 397 U.S. 358, 363 (1970), citing Coffin v. United States, 156 U.S. 432, 453 (1895); see Taylor v. Kentucky, 436 U.S. 478 (1978); Estelle v. Williams, 425 U.S. 501, 503 (1976)("The presumption of innocence . . . is a basic component of a fair trial under our system of criminal justice.") The presumption "extends to every element of the crime," Morisette v. United States, 342 U.S. 246, 275 (1952), and the fact that a defendant may have committed the act alleged does not deprive him of the presumption of innocence on the mental states which affect the degree of his culpability. See, e.g., Mullaney v. Wilbur, 421 U.S. 684, 698-99 (1975). Whether viewed in terms of possible injury to the integrity of the factfinding process or in terms of the difficulty of discerning the possible effects on the outcome of a trial, constitutional errors in

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18/ Like David Sandstrom, petitioner insisted that he did not have the mental capacity to form the requisite intent, and he offered in support of that contention the testimony of Dr. Robert Wetzler, a psychiatrist who testified that petitioner was a "schizoid personality" T. 2248, who was unable to form the requisite mental elements of deliberate homicide and aggravated kidnaping, was unable to appreciate the criminality of his conduct, and was unable to conform his conduct to the requirements of law. T. 2248, 2321.

instructing the jury on critical elements of a crime can only be seen as "fundamental" errors.

This Court has implied that instructions misdirecting the jury on issues central to guilt or innocence can never be harmless. For example, in Bollenbach v. United States, 326 U.S. 607, 613 (1946), a federal prosecution in which the jury had been instructed on an unwarranted presumption, the Court stated that "[a] conviction ought not to rest on an equivocal direction to the jury on a basic issue." Rejecting the Government's argument in Bollenbach that "the sting of error [was] extracted because there was proof, other than the erroneous 'presumption' on the issue" in question, the Court insisted:

> "[T]he question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trial in the federal courts.
>
> * * *
>
> From presuming too often all errors to be 'prejudicial,' the judicial pendulum need not swing to presuming all errors to be 'harmless' if only the appellate court is left without doubt that the one who claims its corrective process is, after all, guilty.

Bollenbach v. United States, supra, 326 U.S. at 614-15. See United Brotherhood of Carpenters & Joiners v. United States, 330 U.S. 395, 408-08 (1947)("No matter how strong the evidence may be . . . there must be a charge to the jury setting out correctly the limited liability . . . . A failure to charge correctly is not harmless, since the verdict might have resulted from the incorrect instruction."); Jackson v. Virginia, 443 U.S. 307, 320 n.14 (1979)("Our cases have indicated that failure to instruct a jury on the necessity of proof of guilt beyond a

reasonable doubt can never be harmless error. . . . Thus, a defendant whose guilt was actually proved by overwhelming evidence would be denied due process if the jury was instructed that he could be found guilty on a mere preponderance of the evidence.")

On remand in petitioner's case, the Montana Supreme Court acknowledged Sandstrom error and admitted that Bollenbach and United Brotherhood of Carpenters "indicate that where there is a jury instruction containing an unconstitutional presumption there can be no harmless error and automatic reversal is required" State v. McKenzie III, supra, 608 P.2d at 458. Yet the Montana court reasoned that "this holding is ameliorated if not eliminated by the later Chapman case . . . declining to adopt any automatic reversal rule but analyzing each case on a case-to-case basis." Id. The Montana court's resolution of the issue, is obviously inadequate, for as demonstrated supra, Chapman itself states that some constitutional errors require automatic reversal.

Whether constitutional errors in instructing a criminal jury may ever be deemed harmless has sharply divided the circuits that have addressed the question, some suggesting that reversal is automatic, see, e.g., United States v. Casale Car Leasing Co., 385 F.2d 707 (2d Cir. 1967); Hammontree v. Phelps, 605 F.2d 1371 (5th Cir. 1979); Mann v. United States, 319 F.2d 404 (5th Cir. 1963) cert. denied, 375 U.S. 986 (1964) with others contending that evaluation under the harmless error standard is appropriate, see, e.g., United States ex rel. Dorey v. New Jersey, 560 F.2d 584 (3rd Cir. 1977); United States v. Martin, 475 F.2d 943 (D.C.

Cir. 1973).[19] State appellate courts also differ on the question. Compare State v. Jones, 377 So.2d 1163 (Fla. 1979) with State v. Rich, 305 A.2d 1123 (Me. 1978).

In light of the absence of a clear standard for determining what constitutional errors are to be subject to the harmless error rule, the unresolved question as to whether this Court's prior decisions permit an unconstitutional jury instruction on a disputed element of the crime ever to be held harmless, and the split among the circuits and among state courts, the Court should grant certiorari to hear and determine this substantial unresolved question.

19/ In the analogous area of instructions on Ulster County/Leary type presumptions, the circuits also split on whether automatic reversal was required after this Court declared certain presumptions unconstitutional in Turner v. United States, 396 U.S. 398 (1970). Compare United States v. Shay, 426 F.2d 287 (2d Cir. 1970); Gibson v. United States, 424 F.2d 491 (3d Cir. 1970); United States v. Vigo, 435 F.2d 1347 (5th Cir. 1970); United States v. Turner, 423 F.2d 481 (7th Cir. 1970); and United States v. Cross, 432 F.2d 1326 (D.C. Cir. 1970) with Martone v. United States, 435 F.2d 609 (1st Cir. 1970); United States v. Fueston, 426 F.2d 785 (9th Cir. 1970).

II.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE COURT BELOW EMPLOYED THE PROPER STANDARD IN DETERMINING THAT THE JURY INSTRUCTIONS GIVEN IN THIS CASE WERE HARMLESS BEYOND A REASONABLE DOUBT.

Even if unconstitutional jury instructions may under some circumstances be held harmless, the question as to the proper means to identify harmless error is unsettled. In Chapman v. California, supra, 386 U.S. at 23, the Court criticized an "overemphasis upon [a standard] of 'overwhelming evidence,'" and embraced instead an approach which asked whether "the error complained of . . . contribute[d] to the verdict obtained," id. at 24. The Court cited with approval in Chapman its earlier opinion in Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963), in which it had defined the inquiry to be "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." Id.

Yet in Harrington v. California, 395 U.S. 250, 254 (1969), while insisting that "[w]e do not depart from Chapman; nor do we dilute it by inference," the Court nevertheless affirmed a conviction, despite the admission of several confessions in violation of Bruton v. United States, 391 U.S. 123 (1968), on the ground that "the case against Harrington was so overwhelming that we conclude that this violation of Bruton was harmless beyond a reasonable doubt. . . ." Id.

Subsequently, in Milton v. Wainwright, 407 U.S. 371, 377 (1972), the Court again affirmed a conviction, despite the use at trial of a statement taken in violation of Massiah v. United

States, 377 U.S. 201 (1964), on the ground that, in light of three other confessions lawfully admitted against the petitioner, this Court was left "with no reasonable doubt that the jury at petitioner's 1958 trial would have reached the same verdict" irrespective of the unlawful evidence.

In subsequent cases, the Court has alternatively employed the Chapman test of whether there exists "a reasonable possibility that the improperly admitted evidence contributed to the conviction," see, e.g., Schneble v. Florida, 405 U.S. 427, 432 (1972), and the Harrington-Milton test of whether "the independent evidence 'is . . . overwhelming'" and the unconstitutionally admitted evidence "merely cumulative," see, e.g., Brown v. United States, 411 U.S. 223, 231 (1973).

Commentators have accurately observed that the focii of the two tests are differents: the former emphasizes the probable taint of the effect of the constitutional error on the deliberations of the jury, while the latter focuses on the quantum of the untainted evidence.[20/]

20/ See generally, Comment, Harmless Error: The Need for a Uniform Standard, "53 St.John's L.Rev.541(1979);Fields,"Harmless Error: A Process in Need of a Rationale," 125 U.Pa.L.Rev.15(1976); Note, "Harmless Constitutional Error: A Reappraisal," 83 Harv. L. Rev. 814 (1970); Mause, "Harmless Constitutional Error: The Implications of Chapman v. California," 53 Minn. L. Rev. 519 (1969); Note, "Harmless Constitutional Error," 20 Stan. L. Rev. 83 (1967).

In their review of federal constitutional errors, the circuit courts have demonstrated confusion on the proper test to employ; compare United States v. Christia, 571 F.2d 64 (1st Cir. 1978); United States ex rel. Macon v. Yeager, 476 F.2d 613 (3rd Cir. 1973); Watson v. Foster, 570 F.2d 501 (4th Cir. 1979); Blackburn v. Cross, 510 F.2d 1014 (5th Cir. 1975); United States v. Mancillas, 580 F.2d 1301 (7th Cir. 1978); United States v. Lonjee, 603 F.2d 1342 (9th Cir. 1979) with United States v. Grant, 494 F.2d 120 (2d Cir. 1974); United States v. Charlton, 565 F.2d 86 (6th Cir. 1977); United States v. Mancino, 468 F.2d 1350 (8th Cir. 1972); Bond v. Oklahoma, 546 F.2d 1369 (10th Cir. 1976); United States v. Lee, 489 F.2d 1242 (D.C. Cir. 1973).

Different tests are also employed by different panels with the same circuit. Compare Blackburn v. Cross, supra, with Hoover v. Beto, 467 F.2d 516 (5th Cir. 1972).

State courts have also settled upon different tests. Compare McCroskey v. State, 586 S.W.2d 1 (Ark. 1979); People v. Bascomb, 392 N.E.2d 1130 (Ill. 1979); Meyer v. State, 406 A.2d 427 (Md. 1979); State v. Porraro, 404 A.2d 465 (R.I. 1979); State v. Barkdale, 590 S.W.2d 931 (Tenn. 1979) with Kelly v. State, 366 So.2d 1145 (Ala. 1979); Lakes v. State, 261 S.E.2d 744 (Ga. 1979); Mulry v. State, 399 N.E.2d 413 (Ind. App. 1980); State v. Henderson, 603 P.2d 613 (Kan. 1979); State v. Hassapelis, 404 A.2d 232 (Me. 1979); State v. Brown, 606 P.2d 678 (Ore. 1980); Haney v. State, 588 S.W.2d 913 (Tex. 1979); Nelson v. Wyoming, 599 P.2d 1326 (Wyo. 1979).

In this case, the Montana Supreme Court discerned three different standards in this Court's prior decisions and stated frankly that

> "[a]s far as we can determine, the United States Supreme Court has not yet fashioned a uniform standard for determining harmless federal constitutional error . . . Under such circumstances, we feel free to adopt any of the three standards in assessing federal constitutional harmless error within the confines of Chapman. It seems to us that the overwhelming weight of the evidence standard addresses the realities of jury trial to a greater degree than the others in the context of the McKenzie case despite criticism of this standard by text writers and local commentators." (Emphasis added) 21/

State v. McKenzie III, supra, 608 P.2d at 458.

21/ As Justice Shea points out in his dissent in McKenzie, supra, 608 P.2d at 463-64, the absence of a uniform standard has given the McKenzie majority an extraordinary sense of freedom, for in Sandstrom, and every other Montana case containing a Sandstrom error, except McKenzie, the Montana court has employed not the "overwhelming evidence test"but instead the Chapman test; State v. Sandstrom II, 603 P.2d 244, 245 (Mont. 1979). Accord: State v. Hamilton, 605 P.2d 1121, 1131 (Mont. 1980); State v. Wogaman, 610 P.2d 1161 (Mont. 1980); State v. Martinez, __ P.2d __ (Mont. June 13, 1980)(No. 14630).

Perhaps different tests are constitutionally warranted depending upon the nature of the constitutional error that has occurred; some courts have suggested such an approach. See, e.g., United States v. Fueston, 426 F.2d 785 (9th Cir. 1970). If differences are warranted, however, errors which "bias the machinery for bringing evidence before the jury," Note, "Harmless Constitutional Error: A Reappraisal, 83 Harv. L.Rev. 814, 820 (1970), must surely be held to the stricter standards. And errors in the instructions given a jury on how to evaluate trial evidence directly involve "the machinery" of a criminal trial; inevitably such errors "materially affec[t] the deliberation of the jury," Holloway v. Arkansas, supra, 435 U.S. at 490, for they structure those deliberations. "A crucial assumption underlying [the jury] system is that juries will follow the instructions given them by the trial judge. Were this not so, it would be pointless for an appellate court to reverse a criminal conviction because the jury was improperly instructed." Parker v. Randolph, 442 U.S. 62, 73 (1979).

Yet the Montana court turned to the least demanding test to evaluate the error here. Moreover, although it "omitted entirely any analysis of the unconstitutional instructions," State v. McKenzie III, supra, 608 P.2d at 474 (Shea, Jr. dissenting) and although it acknowledged the presence of "conflicting testimony of psychiatrists" on the disputed element of intent, State v. McKenzie III, supra, 608 P.2d at 459, the Montana court nevertheless found the error to be harmless because of its own view of the "overwhelming" evidence of intent. Id. at 459.

In his careful analysis of the jury instructions, Justice Shea, dissenting in McKenzie III, demonstrated that due to the numerous and confusing counts on which the jury was instructed, "it is impossible to determine which path or paths the jury took to each of the convictions." State v. McKenzie III, supra, 608 P.2d at 470 (Shea, J. dissenting). Yet he found it clear that "[t]he unconstitutional Sandstrom-type presumptions permeate the instructions given to the jury in this case," id. and could well have affected the jury's deliberations on many possible paths to a conviction.

In Gregg v. Georgia, 428 U.S. 153, 193 (1976), this Court indulged the assumption that "[j]uries are invariably given careful instructions on the law and how to apply it before they are authorized to decide the merits of a lawsuit," deeming it "quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations." In other cases, especially those involving a capital crime, the Court has insisted instructions be accurate, and that doubts concerning the adequacy of jury instructions "be resolved in favor of the accused." Andres v. United States, 333 U.S. 740, 752 (1948); accord Carlton v. Utah, 130 U.S. 83 (1889); Stromberg v. California, 283 U.S. 359, 367-68 (1931); Terminiello v. Chicago, 337 U.S. 1, 5 (1949); Street v. New York, 394 U.S. 576, 585-86 (1969).

In light of widespread confusion on the proper standard for judging harmless error and the serious tendency of some lower courts "to sanction egregious violations of the constitutional rights of criminal defendants by blandly reciting the formula 'harmless error' whenever it appears that the accused was factually guilty," Briggs v. Connecticut, __U.S.__, 48 U.S.L.W. 3801 (U.S., June 10, 1980)(Brennan and Marshall, JJ., dissenting from denial of certiorari), petitioner urges the Court to grant this petition in this case and address the merits of this issue.

III.

THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION OF THE SENTENCE OF DEATH BY HANGING FOR THE CRIMES OF DELIBERATE HOMICIDE AND AGGRAVATED KIDNAPING UNDER THE LAW IN EFFECT IN MONTANA AT THE TIME OF THE OFFENSE FOR WHICH PETITIONER WAS CONVICTED COMPORTS WITH THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

This case involves the only death sentence imposed under a Montana capital punishment statute enacted in 1973 in the wake of Furman v. Georgia, 408 U.S. 238 (1972),[22] which was thereafter amended -- first in 1974 and then again in 1977 -- to provide different procedures for imposition of death sentences for the crimes of "deliberate homicide" and "aggravated kidnaping." Under the 1973 statute, the trial court was required to impose a death sentence for six categories of "deliberate homicide" and the offense of kidnaping unless the trial court, sitting without a jury, found that there were "mitigating circumstances." Mont. Rev. Codes Ann. §94-5-304 (1974 supp.).

22/ The Montana Supreme Court invalidated the State's pre-Furman capital sentencing procedure in State v. Rhodes, 524 P.2d 1095, 1099 (1974). The Montana Criminal Code Commission explained the Montana Legislature's post-Furman statute applicable in petitioner's case as follows:

> "if any capital punishment statute is to achieve constitutional approval it must be both mandatory and specific. Subsection (1) purports to establish mandatory capital punishment by use of the terms 'shall.' This is followed by a humanistic escape valve in the phrase, 'unless there are mitigating circumstances.' The terms are apparently contradictory -- but, in fact, the mandatory language is subject to the exception and ultimately only a test case in the United States Supreme Court can ascertain the constitutionality of the provision."

Criminal Code Commission Comment to Mont. Rev. Codes Ann. §94-5-105 (1973 supp.).

The determination whether sufficient undefined "mitigating circumstances" exist to justify the imposition of a sentence less than death under this statute was to be made "exclusively" by the trial court. Mont. Rev. Codes Ann. §95-2212 (1969). No standards or procedures were provided to guide this sentencing discretion.

When the Supreme Court of Montana vacated pre-Furman death sentences in 1974, it commented that:

> "Subsequently [to Furman], the Legislature enacted into law a mandatory death penalty. We emphasize here that our [present] holding does not in any way purport to rule on the validity of the new statute." State v. Rhodes supra, note 22, 524 P.2d at 1101.

In its consideration of petitioner's appeal, the Montana Supreme Court reviewed the 1973 death penalty statute in light of this Court's decisions in Gregg v. Georgia, 428 U.S. 153 (1976), and companion cases. It upheld the constitutionality of the statute, noting that "[t]he sentencing procedure . . . requires the individual characteristics of the person convicted be considered," State v. McKenzie I, supra, at 557 P.2d 1030, that "[r]eview of the sentence imposed is provided for," ibid., and that "'jury participation in the sentence' is [not] a necessity for constitutionality," id. at 1031. On initial remand from this Court, the Montana Court reiterated its holding, stating:

> "Although Montana's statutory scheme is unlike those approved by the United States Supreme Court in Gregg, Proffitt and Jurek, we see no substantive failure of Montana's statutory scheme to comply with constitutional standards."

State v. McKenzie II, supra, at 581 P.2d 1229. That determination was readopted by the Montana Supreme Court in State v. McKenzie III, supra, 608 P.2d at 450-51 and the consequent affirmance of petitioner's death sentences presents a number of questions

invoking this Court's "obligation to re-examine capital sentencing procedures against evolving standards of procedural fairness in a civilized society." Gardner v. Florida, 430 U.S. 349, 357 (1977).

A. The Failure of Montana's 1973 Capital Sentencing Law to Meet the Procedural Requirements of Furman v. Georgia.

Petitioner has plainly been condemned under a capital sentencing procedure that fails to "address the concerns expressed by the Court in Furman," Gregg v. Georgia, supra, 428 U.S. at 180. Montana's 1973 statute consisted simply of a broad mandatory death penalty for five categories of "deliberate homicide" and any "aggravated kidnaping" resulting in the death of the victim, subject to "a humanistic escape valve in the phrase 'unless there are mitigating circumstances.'" Criminal Code Commission Comment to Mont. Rev. Codes Ann. §94-5-105 (1973 supp.) The "humanistic escape valve" is, of course, nothing new or local to Montana. It resurrects an antiquated pre-Furman death-sentencing formula under which the defendant is required to be hanged unless undefined "mitigating circumstances" are found. See, e.g., Winston v. United States, 172 U.S. 303 (1899)(rejecting the "mitigating circumstances" approach as a matter of federal practice). Judicial discretion to impose or not impose the death penalty is not meaningfully circumscribed by such a formula. This Court squarely so held in 1972 when, pursuant to Furman, it vacated death sentences imposed under the laws of at least three States that used the formula. Tilford v. Page, 408 U.S. 939 (1972)(per curiam)(see, e.g., Jones v. People, 146 Colo. 40, 360 P.2d 686, 692 (1961); Jones v. People, 155 Colo. 148, 393 P.2d 366, 367-368 (1964)); Williams v. Kentucky, 408 U.S. 938 (1972)(per curiam) (see, e.g.,

Edwards v. Commonwealth, 298 Ky. 366, 182 S.W.2d 948, 951 (1944)); Herron v. Tennessee, 408 U.S. 937 (1972)(per curiam) (see Tenn. Code Ann. §39-2406 (1955); e.g., Woodruff v. State, 164 Tenn. 530, 51 S.W.2d 843, 848 (1932)).

The 1973 Montana statute "simply papered over the problem of unguided and unchecked . . . discretion" in death sentencing, Woodson v. North Carolina, 428 U.S. 280, 303 (1976)(plurality opinion) by combining the vices of the death-sentencing procedures that this Court found unconstitutional in 1972 and 1976. It first made a mandatory death penalty the presumptive sentence for a broad roster of criminal offenses, see Roberts v. Louisiana, 428 U.S. 325 (1976), and then allowed the trial court to impose a lesser sentence in a manner that continued the pre-Furman regime of "complete judicial discretion," State v. Palen, 120 Mont. 434, 186 P.2d 223, 224 (1947), unguided and uncontrolled by any standards that would "focus . . . attention on the particularized nature of the crime and the individual defendant," Gregg v. Georgia, supra, 428 U.S. at 206 (plurality opinion).

Simply narrowing slightly the range of capital crimes[23/] or substituting standardless judicial discretion for standardless

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23/ In the aftermath of Furman, this Court and lower courts invalidated discretionary death sentences for crimes much more narrowly defined than those for which petitioner was condemned see, e.g., Duling v. Ohio, 408 U.S. 936 (1972)(see former Ohio Rev. Code Ann. §2910.04 (1953); Ohio Acts 1925, (Vol. CXI, p.77)); People v. Fitzpatrick, 32 N.Y.2d, 499, 346 N.Y.S.2d 793, N.E.2d 139 (1973); People ex rel. Rice v. Cunningham, 61 Ill.2d 353, 336 N.E. 2d 1 (1975). See generally, Roberts v. Louisiana, supra, (plurality opinion).

jury discretion in capital sentencing[24/] does not meet Eighth Amendment requirements. See People ex rel. Rice v. Cunningham, 61 Ill. 2d 353, 336 N.E.2d 1 (1975). A state "must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance' and that make 'rationally reviewable the process for imposing a sentence of death.'" Godfrey v. Georgia, __U.S.__, 48 U.S.L.W. 4541, 4543 (U.S., May 20, 1980)(citations omitted). At the heart of this Eighth Amendment requirement is an "informed, focused, guided and objective inquiry into the question whether [a particular defendant] . . . should be sentenced to death." Proffitt v. Florida, 428 U.S. 242, 259 (1976).

The 1973 Montana statute provided no such inquiry. Instead petitioner was sentenced to die simply because the judge that sentenced him found that the death penalty was "justified" in his case. Ct. File Item 169; Appendix H, infra at 9. While

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24/ Many discretionary death sentences reversed in the wake of Furman had been imposed by a judge after a bench trial, see, e.g., Cunningham v. Maryland, 408 U.S. 938 (1972) see Cunningham v. State, 247 Md. 404, 231 A.2d 501 (1967); Pope v. Nebraska, 408 U.S. 933 (1972) see State v. Pope, 186 Neb. 489, 184 N.W.2d 395 (1971); Staton v. Ohio, 408 U.S. 938 (1972) see State v. Staton, 25 Ohio St.2d 107, 267 N.E.2d 122 (1971); or upon a guilty plea, see, e.g., Alvarez v. Nebraska, 408 U.S. 937 (1972) see State v. Alvarez, 185 Neb. 557, 177 N.W.2d 591 (1970) Menthen v. Oklahoma, 408 U.S. 940 (1972) see Menthen v. State, 492 P.2d 351 (Okla. Crim. App. (1971).

In Proffitt v. Florida, supra, 428 U.S. at 253 (plurality opinion), the Court ruled that sentencing judges must be "given specific and detailed guidance to assist them in deciding whether to impose a death penalty or imprisonment for life." The argument that "trial judges can be trusted to exercise their discretion in a responsible manner" and need no standards or guidance "is inconsistent with the basis upon which the Florida capital sentencing procedure was upheld" in Proffitt. Gardner v. Florida, 430 U.S. 349, 360 n.11 (1977).

the judge assigned various reasons for his decisions, neither the aggravating nor the mitigating factors he cited[25] nor the procedure by which he found them[26] had any statutory basis.

In short, nothing about the statutory and judicial process through which petitioner -- and only petitioner -- was selected to die under the former Montana death penalty law meaningfully responded to Furman's mandate that "discretion . . . on a matter so grave as the determination of whether a human life should be taken or spared . . . must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Gregg v. Georgia, supra, 428 U.S. at 189. This

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25/ At sentencing, petitioner's counsel protested that the determination of the presence or absence of statutorily undefined "mitigating circumstances" was the kind of amorphous and discretionary standard condemned in Furman, Petition and Motion in Mitigation, Ct. File Item 162, at pp. 1-2. Counsel asserted that they were unable to determine exactly what "matters in mitigation" they could legitimately present, id. at 2-3. The defense did offer several considerations to the court as mitigating factors: petitioner's youth, id. at 3, his deprived and rootless background, ibid., his "mental disease" or "personality disorder" found by psychiatrists for both the defense and prosecution, ibid., and the court's previous agreement to sentence him to a term of imprisonment upon his guilty plea, id. at 4. The Court's written Findings, Conclusions and Sentence, Ct. File Item 169; Appendix H, infra, discusses primarily nonstatutory factors in aggravation -- the seriousness of the crime, the "dangerousness" of the defendant, and his prior record, id. at 7-8, and the need to keep him from being "turned loose to menace society again," id. at 9.

26/ The post-trial sentencing proceeding that was held in petitioner's case "was not statutorily based." Note, Montana's Death Penalty, 38 Mont. L. Rev. 217, 219 (1977). See State v. McKenzie II, supra, 581 P.2d 1269-73 (Shea, J., dissenting). The Montana court in petitioner's case found them nonetheless authorized and required by "[r]eading . . . provisions together" which required presentence investigations in all felony cases and mandated sentencing in all cases "in accordance with . . . [the] individual characteristics, circumstances, needs and potentialities" of the defendant. State v. McKenzie II, supra, 581 P.2d at 1229. In actuality, such provisions were not required, but were discretionary proceedings not directly applicable to capital cases. See id. at 1260-1271 (Shea, J., dissenting).

Court should grant certiorari because it "cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be wantonly and freakishly imposed." Ibid., quoting Furman v. Georgia, supra, 408 U.S. at 310 (concurring opinion of Mr.Justice Stewart).

B. The Total Lack Of Jury Participation In Capital Sentencing.

This Court heretofore has reserved judgment on whether "the Constitution requires that the death sentence be imposed by a jury." Lockett v. Ohio, 438 U.S. 586, 609 n.16. The decision that petitioner be sentenced to death was made solely by the trial judge. This case thus squarely presents that question.

In view of the "awesome finality of a capital case,"[27/] American jurisdictions had, prior to Furman v. Georgia, supra, determined with near unanimity that infliction of the death penalty should be put in the hands of the jury rather than the judge. Indeed, "[e]xcept for four States that entirely abolished capital punishment in the middle of the last century, every American jurisdiction has at some time authorized jury sentencing in capital cases." McGautha v. California, 402 U.S. 183, 200 n.11 (1971). See Woodson v. North Carolina, supra, 428 U.S. at 291-292. In the last ten years, only Montana and a few other states have reversed this historical evolution by removing the jury altogether from the sentencing process.

In its 1976 decisions holding that the death penalty could be a constitutionally appropriate punishment for some crimes this Court reaffirmed the desirability of jury input in the capital

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27/ Kinsella v. Singleton, 361 U.S. 234, 249, 255 (1960)(dissenting and concurring opinion of Mr. Justice Harlan).

sentencing process. Gregg v. Georgia, supra, 428 U.S. at 190; Proffitt v. Florida, supra, 428 U.S. at 252.[28] And while it has "never suggested that jury sentencing is constitutionally required," Proffitt v. Florida, supra, 428 U.S. at 252, neither has it considered nor approved a post-Furman death penalty statute which excluded the jury totally from the process of determining sentence.[29] It has approved only one encroachment upon the jury's traditional sentencing power in a capital case: the system whereby a Florida trial judge may impose a death sentence where a jury's recommendation of life imprisonment is clearly unreasonable. See Proffitt v. Florida, supra.[30]

28/ See also Witherspoon v. Illinois, 391 U.S. 510, 520 n.15 (1968); McGautha v. California, supra, 402 U.S. at 200 n.11,211.

29/ The Court's conjecture that "judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases," id. at 252, must of course, be taken in the context in which it was issued -- as a statement of the probable result of a system in which an advisory jury sentence may be mitigated at the discretion of the trial judge and may be increased only where a life sentence would be clearly unreasonable, id.at 249. Even so, it is not borne out by the record of extensive documentation of widely varying sentencing attitudes and practices among judges. See, e.g., TWENTIETH CENTURY FUND, TASK FORCE ON CRIMINAL SENTENCING, REPORT: FAIR AND CERTAIN PUNISHMENT (1976); VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS (1976); FRANKEL, CRIMINAL SENTENCES -- LAW WITHOUT ORDER (1972); HOGARTH, SENTENCING AS A HUMAN PROCESS (1971); Zumwatt, The Anarchy of Sentencing in the Federal Courts, 57 J. AM. JUD. SOC. 96 (1973).

30/ The Court described Florida's sentencing system as follows:

> "The jury's [sentencing] verdict is determined by majority vote. It is only advisory; the actual sentence is determined by the trial judge. The Florida Supreme Court has stated, however, that '[i]n order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should

cont'd.

This precedent obviously does not resolve the constitutionality of Montana's procedure. The Court should review the question whether the statutory exclusion of the jury from the capital sentencing decision is consistent with the "evolving standards of procedural fairness in a civilized society," Gardner v. Florida, supra, 430 U.S. at 357 (plurality opinion), "employed by the State to select persons for the unique and irreversible penalty of death," Woodson v. North Carolina, supra, 428 U.S. at 287 (plurality opinion)(footnote omitted).

C. Unreliability of the Factual Foundation of Petitioner's Death Sentence.

This Court has recognized that "[b]ecause of [the] . . . qualitative difference [between the death penalty and a sentence of imprisonment], there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case," Woodson v. North Carolina, supra, 428 U.S. at 305 (plurality opinion) (footnote omitted). Because "the action of the sovereign in taking the life of one of its citizens . . . differs dramatically from any other legitimate state action, [i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice and emotion." Gardner v. Florida, supra, 430 U.S. at 359 (plurality opinion).

30/ cont'd.

> be so clear and convincing that virtually no reasonable person could differ.' Tedder v. State, 322 So.2d 908, 910 (1975)."

Proffitt v. Florida, supra, 428 U.S. at 248-249 (plurality opinion). In Florida, therefore, there is substantial presumption that the jury's advisory sentence will, in fact, be imposed. See Gardner v. Florida, supra. In Montana, however, the jury plays no role in sentencing whatsoever.

Yet the trial judge's deliberation on petitioner's sentence began with a jury's verdict being pronounced and publicized[31] that required a death sentence unless the court interceded with a finding of "mitigating circumstances." The judge was given no rules of procedure and no standards by which he was to make his ruling on mitigation. No factual hearings were prescribed or held; the judge simply read submitted reports and relied on his hearing of the evidence at trial. The "debate between adversaries [which] is often essential to the truth-seeking function" Gardner v. Florida, supra, 430 U.S. at 360, was held only after the judge's decision and petitioner's death sentence had been written.

Moreover, the written Findings of the trial court -- which ranged over numerous matters quite distinct from the question of "mitigation", contained two significant factual errors. First, although the trial court submitted to the jury a verdict of "Sexual Intercourse Without Consent: Guilty", Add. Instr. 54, Ct. File Item 154, the jury did not find petitioner guilty of this offense. See T. 2605. But in its "Findings, Conclusions, Sentence and Order," the trial court imposed the death penalty upon petitioner because "[t]he evidence in the case, and as found by the jury discloses a brutal, conscienceless, torture, rape and

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31/ The Montana procedures utilized here unnecessarily subject a judge to the public pressures attendant upon the reducing of a jury-imposed sentence of death in order to assure the defendant the kind of hearing that is his constitutional right. Such a procedure is tantamount to the beginning of a criminal trial on the issue of guilt by a public proclamation that the defendant is guilty. The pressures upon a trial judge who must appear to overrule the considered decision of twelve citizens who have sat through the trial of a case and rendered a capital verdict constitute too great a threat to the judge's impartiality to be permitted consistently with the Eighth and Fourteenth Amendments. See generally Beck v. Alabama, __U.S.__, 48 U.S.L.W. 4801,4806 n.22 (U.S. June 17, 1980); Tumey v. Ohio,273 U.S. 510 (1927); Ward v.

deliberate killing of a human being," and because "of the rape torture, kidnapping and killing of Lana Harding of which the defendant has been found guilty," Ct. File Item 169, at pp. 7, 8; Appendix H, infra (emphasis added).

Second, the trial court asserted that "under existing Montana Statutes the defendant under a 100 year imprisonment sentence would automatically be eligible for parole in 12 1/2 years less good time allowance [and] . . . the 12 1/2 years could and would be cut so that the defendant would only be required to service [sic] approximately seven years of the 100 year sentence before he would be turned loose." Id. at 9. This is simply incorrect.[33]

31/ cont'd.

City of Monroeville, 409 U.S. 57 (1972); Connally v. Georgia, 429 U.S. 245 (1977).

32/ The assertion that the evidence "as found by the jury" showed a "deliberate" killing was also inaccurate.

33/ The trial judge's assertion that petitioner "would be turned loose to menace society" after serving only seven years of a one hundred year sentence is erroneous. Under Mont. Rev. Codes Ann. §95-3214(1)(a)(1973 Supp.), a prisoner is eligible for parole after "he has served at least one-quarter (1/4) of his full term, less good time allowances off, as provided in section 80-1905." Under the latter section, it would be impossible to accumulate more than 12 1/2 years, which would reduce the twenty-five years ("one quarter . . . of his full term") to 12 1/2 years. And of course -- contrary to the judge's flat statement -- there is no guarantee that a prisoner who is eligible for parole at this point would be granted it.

Petitioner's submission here is not that the trial court was forbidden to make a finding of rape even though the jury had not made such a finding,[34] or that the trial judge was forbidden to evaluate the chances of petitioner's being paroled. But in his finding of rape, the trial judge relied on a jury finding which was never in fact made; and in his estimation of petitioner's chances for parole, the trial judge misunderstood the governing law. "When life itself is what hangs in the balance, a fine precision in the process must be insisted upon." Lockett v. Ohio, supra, 438 U.S. at 620 (concurring opinion of Mr. Justice Marshall). This Court should grant certiorari to consider the reliability of the "blunderbuss, virtually mandatory approach to imposition of the death penalty," ibid., used by Montana here. For just as in Gardner v. Florida, supra, it appears probable that petitioner's "death sentence rests on an erroneous factual predicate." 430 U.S. 262.

34/ In affirming petitioner's death sentence, the Montana Supreme Court also relied on the trial judge's erroneous finding of rape, since it cited in support of its affirmance the trial judge's findings "(1) that the murder was committed in the commission of a felony; (2) [that there was] a sexual attack on the victim, and (3) [that] 'it was brutal, conscienceless, torture rape and deliberate killing of a human being." State v. McKenzie I, supra, 557 P.2d at 1034.

IV.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE FAILURE OF THE COURTS BELOW TO ENFORCE A PLEA BARGAINING AGREEMENT BETWEEN PETITIONER, THE STATE, AND THE TRIAL COURT, WHICH PETITIONER'S COUNSEL HAD RELIED UPON IN REVEALING TO THE STATE PRIOR TO TRIAL PETITIONER'S TRIAL STRATEGY AND TACTICS, DEPRIVED PETITIONER OF DUE PROCESS OF LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

This Court has recognized the "[t]he disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining', is an essential component of the administration of justice," Santobello v. New York, 404 U.S. 257, 260 (1971). See also Blackledge v. Allison, 431 U.S. 63, 66 (1977). As a "phase in the process of criminal justice," plea bargaining "must be attended by safeguards to insure the defendant what is reasonably due in the circumstances," Santobello v. New York, supra, 404 U.S. at 262.

This case presents an instance where these "safeguards" broke down, and petitioner was prejudiced by unfair plea bargaining practices. Like Blackledge v. Allison, supra, petitioner's case presents a significant question of the fairness of plea bargaining procedures which should be resolved by this Court.

Petitioner was tried, convicted and sentenced to death after the county attorney who prosecuted him, and the judge who heard his case, had agreed to permit him to plead guilty and to receive a sentence of imprisonment -- and after his counsel, in reliance on that agreement, had revealed to the State the substance

of his planned defense.[35] In a meeting on December 22, 1974, defense counsel, County Attorney Nelson, and Special Prosecutor Douglas Anderson agreed that petitioner would plead guilty to two charges (deliberate homicide and aggravated assault) and receive sentences of 50 and 20 years, respectively, on those counts. Affidavit of Barney Reagan, Esq., Ct. File Item 99, at p.2.

On December 23, 1974, that agreement was presented to the trial judge, R.J. Nelson, during a three hour meeting in chambers. Id. at 3. Judge Nelson agreed to accept the proposed pleas after a slight modification in sentence (which was agreed to by all parties). Ibid. The trial court set December 30, 1974, for the entry of guilty pleas pursuant to the agreement. Id. at 4. Also pursuant to that understanding, counsel for both sides held a further meeting on December 23, at which the defense presented to the prosecution the tactics it envisioned using at trial and the weaknesses it saw in the State's case, in order to assist the prosecutors in explaining and justifying the plea agreement to the Sheriff's office, the victim's family and the

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35/ The evidence on this matter which appears in the record consists of defense counsel's affidavits and statements to the trial court, and the trial judge's responses. Other than in its unsworn Brief in the Montana Supreme Court -- where it "agree[d] with the basic factual description of the events" given by defense counsel, State v. McKenzie I, supra, 557 P.2d at 1038, see Brief of the State of Montana v. McKenzie, Mont. Sup. Ct. No. 13011, at pp. 17-21 -- there has never been any response to these claims by counsel for the State of Montana. In its Brief, the State claimed that it "was well understood that the prosecution still considered" Lana Harding's family's approval necessary the day before the meeting with Judge Nelson. Id. at 19. It did not address what representations had been made in the meeting itself. Though it acknowledged that information concerning the defense's trial tactics had been revealed after the meeting, it denied that it had been "requested", and said that it all "was either already known to the prosecution or of no signicance to the prosecution's case." Id. at pp. 20, 21.

public.[36] Ibid.

On December 28, 1974, counsel for the State advised defense counsel that they were abrogating the plea agreement because of objections voiced by Ms. Harding's family.[37] Ibid. On December 30, 1974, the parties nonetheless appeared at the hearing that had been set for entry of the pleas. T. 1-6 (Dec. 30, 1974).

Defense counsel advised the court that "the prosecution does not wish to proceed with the agreement and understanding that we reached here, with this court, on the 23rd day of December, 1974" T. 5 (Dec. 30, 1974); and see id. at 3-6, 12-16, and expressed petitioner's willingness "to go ahead with that [December 23] agreement and understanding reached." Ibid. The court responded that "if [the prosecutors] . . . don't want to go through with plea bargaining, I don't suppose they have to," and asked County Attorney Nelson, "Do you want to proceed the way that you agreed with counsel last Monday, the 23rd of December . . . ?" Ibid. The prosecutor responded that he did not. The trial judge denied the defense motion (Ct. File Item 94) that he disqualify himself because of involvement in the bargaining process, T. 24 (Dec. 20, 1974,[38] and ordered the case to trial over continuing defense

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36/ The weaknesses the defense foresaw were due primarily to the manner in which the investigation had been conducted; the defense had concluded that some of the evidence obtained and the evidence collected would be inadmissible at trial. Ibid.

37/ In his Reply Brief in the Montana Supreme Court petitioner's counsel contended that he was told by the prosecutors that Ms. Harding's family did more than "object": her father "threatened to kill the prosecutors if they went through with the bargain." Reply Brief of Appellant, State of Montana v. McKenzie, Mont. Sup. Ct. No. 13011, at p. 12.

38/ The court did permit defense counsel to state for the record what had transpired with regard to the plea agreement, over the prosecutor's objection that he didn't "feel that we should make references to all of this." T. 14 (Dec. 30, 1974). Defense counsel summarized the plea negotiations and stated that petitioner had agreed to plead guilty in exchange for a sentence of imprison-

objection.[39]

On the first day of trial, the State was permitted to endorse fifty-eight more witnesses, Ct. File Item 113, many of whom testified to the chain of custody of various evidentiary items. T. 80-81, 88. Petitioner objected to the endorsement of these witnesses on the ground that the State had discovered the need for many of them only after the defense had revealed its intended trial tactics pursuant to the plea agreement, but the objection was overruled. T. 91; Ct. File Item 114.

The Montana Supreme Court has affirmed these trial court rulings on three occasions. In its first decision, on petitioner's direct appeal, it did so on the theory that the State's "intent to get the reaction of the victim's parents and the sheriff" kept the agreement from becoming final and that Santobello was distinguishable because "[t]here a plea had been entered." State v. McKenzie I, supra, 557 P.2d at 1038. After remand by this Court, however -- as part of its "reconsider[ation of]the entire case," State v. McKenzie II, supra, 581 P.2d at 1210, but without any new material

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38/ (cont'd)
ment, that this arrangement had been accepted by the prosecution and the court (ibid.), and that the defense in reliance on this agreement had informed the prosecution of its trial strategy and tactics and of the weaknesses it perceived in the State's case (id. at 15). The prosecutor did not respond to or contest any of the representations, or those made in defense counsel's affidavit filed later that day. Affidavit of Barney Reagan, Esq., Ct. File Item 99.

39/ On January 3, 1975, a "Motion to Enforce Agreement of December 23, 1974," was filed by the defense, again setting out the facts surrounding the plea agreement, Ct. File Item 104, and this motion was denied that same day, Ct. File Item 105. When, at trial, the State moved to endorse fifty-eight more witnesses -- many of whom were to testify on chain of custody, the defense objected, claiming prejudice on account of the abrogated plea agreement, but the objection was overruled. T. 80-96; Ct. File Items 114, 115. Finally, at the close of trial, the defense filed a "petition and Motion in Mitigation," Ct. File Item 163, and a Motion for a New Trial, Ct. File Item 163, based, in part, on the same grounds, but this motion was summarily denied by the trial court.

of record before it [40] -- the court recounted what it said was "the State's version" of the plea bargaining process "that throughout the discussions the State consistently took the position that no plea bargain could be entered into without the consent of the victim's family and the Sheriff," [41] and that "any gratuitous information that defense counsel believed they had imparted . . . was either already known to the State or was of no significance. . . ." Id. at 1214. It then found that "the trial judge accepted the State's version" and said it did "likewise", ibid. -- although that "version" was never placed before the trial court, and the trial court's own language was that the prosecuting attorney had "agreed." See page 47, supra. Finally, the court on rehearing said "any statements of defense counsel concerning weaknesses in the State's case . . . were gratuitous and premature," and that "a trial is not a sporting contest . . . in which the verdict turns on nondisclosure of such matter." Ibid. The same version of events was recounted in the most recent affirmance. State v. McKenzie III, supra, 608 P.2d at 438-39.

In Santobello v. New York, supra, this Court ruled squarely that due process requires that "when a plea rests in any significant degree on a promise or agreement of the prosecutor . . . such

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[40] The State declined to discuss other than the Patterson issues in its argument on the initial remand. Respondent's Brief on Remand, State v. McKenzie II, Mont. S. Ct. No. 13011 at 3.

[41] The State's representations on the matter to the Montana court in its opening Brief there were limited to what was "understood" the day before the meeting with Judge Nelson; it never addressed what transpired in the actual plea discussions themselves. See note 60, supra; Brief of the State of Montana v. McKenzie, supra at 19-20.

promise must be fulfilled." 404 U.S. at 262. In petitioner's case, although no plea was accepted by the trial court, petitioner nevertheless made a "waiver of [his] constitutional rights" in consideration of the bargain almost as serious as that "implicit in [a guilty] plea." 404 U.S. 268 (concurring and dissenting opinion of Mr. Justice Marshall). By revealing to the prosecution the strategies the defense had planned for trial, petitioner, through his counsel, opened to the State the "privileged area" in which his attorney had analyzed and prepared his case. United States v. Nobles, 422 U.S. 225, 238 (1973). He abandoned his right "to remain silent unless he [chose] to speak in the unfettered exercise of his own will," Malloy v. Hogan, [illegible] U.S. 1, 8 (1964), and to force the prosecution to "'to shoulder the entire load,'" Miranda v. Arizona, 384 U.S. 436, 460 (1966), "to prove its case without any assistance of any kind from the defendant himself." Williams v. Florida, 399 U.S. 78, 108 (1970) (dissenting opinion of Justice Black).

While a criminal defendant may have no absolute right to have his guilty plea accepted by a court, Lynch v. Overholser, 368 U.S. 705, 719 (1962), surely if a defendant has been prejudiced by fulfilling the conditions precedent to a plea bargaining agreement, and by agreeing to plead guilty with the judge who will preside over a trial in which he is presumed innocent, the prosecutor's subsequent unilateral abrogation of that agreement violates fundamental fairness.[42/] The justifications offered for the State's

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42/ The lower federal courts have held that while the binding nature of a plea agreement may be "a matter of state law . . . where . . . there is no showing that the accused was prejudiced in preparing his defense," Sanchell v. Parratt, 530 F.2d 286, 291 n.3 (8th Cir. 1970), where a defendant "to his prejudice, performed his part of the agreement while the Government did not," United States v. Paiva, 294 F. Supp. 742, 747 (D.D.C.Cir. 1969), due process requires that the bargain be enforced. See United States v.

breach of its agreement here provide no adequate basis for departure from Santobello's rule. Whether it was in fact "always [the State's] . . . intent to get the reaction of the victim's parents and the sheriff before . . . [the] bargain would be completed," or whether the prosecutor changed his mind about the bargain because of the vehemence with which those parties objected, the result is the same. It is irrelevant whether or not there is "proof of bad faith." "That the breach of the agreement was inadvertent does not lessen its impact." Santobello v. New York, supra, 404 U.S. at 262.

"Prosecutorial duties affecting the fairness of trials have never been . . . restricted" "to good faith effort." Correale v. United States, 497 F.2d 944, 947 (1st Cir. 1973). The meticulous standards of both promise and performance [required by the Constitution from] . . . prosecutors engaging in plea bargaining," ibid., are not met by permitting the State to back out of a bargain which is relied upon by the defense to its prejudice, merely because the prosecuting attorney may have had a subjective intent to make the bargain conditional. Certiorari should be granted here to consider whether the State gained a fundamentally unfair advantage, see Wardius v. Oregon, 412 U.S. 470 (1973), by abrogating its plea agreement in this capital case, and whether this is a situation where "once a defendant has carried out his part of the bargain the Government must fulfill its part." United States v. Hallam, 472 F.2d 168, 169 (9th Cir. 1973).

42/ (cont'd) Carter, 454 F.2d 426 (4th Cir. 1972). See also, e.g., United States v. McClintic, 570 F.2d 685, 692 (8th Cir.1978) (dictum); Hammers v. State, 550 S.W.2d 432 (Ark. 1977); State v. Davis, 188 So.2d 24 (Fla. App. 1966); Butler v. State, 228 So.2d 421 (Fla. App. 1969); State v. Kuchenreuther, 218 S.W.2d 621 (Iowa 1971); State v. Brockman, 277 Md. 687, 357 A.2d 76 (1976); People v. Reagan, 397 Mich. 306, 235 N.W.2d 581 (1975); People v. Shipp, 68 Mich. App. 452, 243 N.W.2d 18 (1976).

V.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE INTRODUCTION AT TRIAL OF EVIDENCE FROM PETITIONER'S DWELLING PLACE AND TRUCK PARKED OUTSIDE HIS DWELLING PLACE PURSUANT TO A SEARCH WARRANT VIOLATED HIS RIGHTS UNDER THE FOURTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES TO BE FREE FROM SEARCHES AND SEIZURES UNDER WARRANTS WHICH ARE NOT BASED ON PROBABLE CAUSE AND WHICH DO NOT "PARTICULARLY DESCRIB[E] THE . . . THINGS TO BE SEIZED".

This case presents for review two important and recurrent Fourth Amendment issues: the circumstances under which probable cause to arrest may suffice as probable cause to search the arrestee's dwelling, and the permissibility of the seizure under a search warrant of items which are not mentioned in the warrant and are neither "contraband" nor evidence of criminal conduct.

The relevant facts may be quickly sketched. At about 6:00 p.m. on January 22, 1974, the day Ms. Lana Harding's disappearance was reported, Pondera County Attorney David Nelson requested Justice of the Peace Robert Wolfe to issue warrants for the arrest of petitioner (on a charge of assault) and for the search of "[t]he residence of [petitioner] and the surrounding curtiledge [sic] area known as the old Frank Jochem residence."[43/] The County Attorney presented in support of these requests his own affidavit and the sworn, unrecorded testimony of Deputy Sheriff Jerry Hoover. This affidavit stated that Lana Harding "is missing and may have been the victim of foul play";

43/ The Complaint (filed by County Attorney Nelson charging petitioner with assault), the Warrant of Arrest (issued by Justice of the Peace Wolfe for assault), the affidavit of County Attorney Nelson in support of the issuance of a search warrant, the Search Warrant, and the Sheriff's Return on the Search Warrant, all contained in Ct. File Item 76, are reproduced in the dissenting opinion of Judge Shea, State v. McKenzie II, 581 P.2d at 1240-43.

that there was evidence of "scuffling" in the teacherage where she resided; that a tennis shoe, a trail "of an object being dragged from the teacherage," and "a woman's watch and blood stains" were found outside the teacherage; that the watch and blood stains were found "in the same area as the pickup truck driven by [petitioner] . . . [which was] observed on the evening of January 21, 1974, at approximately 8:00 to 8:30 o'clock P.M."; that the previous evening petitioner had come to the house of one Dan Pearson who "resides next to the teacherage directly north of the [petitioner's] residence" and had appeared "highly nervous and excited" and had requested Pearson's assistance in getting his truck started; and that Pearson had assisted petitioner to get his truck started, whereupon petitioner drove off in an easterly direction. Ct. File Item 76.

Deputy Hoover told the Justice 44/ that at the teacherage he had "observed the eyeglasses on the floor in the bedroom and the throw rugs pushed up together against each other, and then the scuff marks on the floor, . . . [and a] tennis shoe being outside on the porch and the drag trail, and the blood on the road and the watch." Ct. File Item 30, at p.6. The deputy, who had interviewed Dan Pearson, also told the Justice of petitioner's appearing at Pearson's house on the previous night ("he [petitioner]

44/ Although Deputy Hoover's January 22, 1974, testimony before the Justice of the Peace was not transcribed, he gave a deposition on March 12, 1974, in the presence of counsel for petitioner and the State, which summarized his earlier testimony. This deposition appears in the record below as Ct. File Item 30.

had ran a long ways, and . . . he talked very rapidly and seemed awfully nervous," id. at 7), and of Pearson's helping petitioner start his pickup truck "in the approximate location of the blood and watch on the road there." Ibid.[45/]

On the basis of the affidavit and additional oral testimony, Justice of the Peace Wolfe issued a warrant for petitioner's arrest on a charge of misdemeanor assault and a search warrant for petitioner's dwelling and pickup truck to seize three described items of petitioner's clothing, five described items of women's

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45/ The Montana Supreme Court stated that in support of the issuance of the search warrant "there was sworn testimony by the county attorney and deputy sheriff in addition to the affidavit and the combination thereof established probable cause." State v. McKenzie I, supra, 557 P.2d at 1035. The record does not reveal what this "sworn testimony by the county attorney" was, apart from the affidavit filed by County Attorney Nelson. Deposition of Justice of the Peace Robert O. Wolfe, Ct. File Item 30, at p.4. Insofar as the Montana Supreme Court has relied upon unrecorded testimony as a basis for issuing the search warrant, a significant Fourth Amendment question is presented "whether the Constitution requires that, at or before the time a warrant issues, the judicial officer make a permanent record of the evidentiary basis for its issuance." Christofferson v. Washington, 393 U.S. 1090 (1969) (opinion of Mr. Justice Brennan, dissenting from denial of certiorari).

Indeed, the Montana Supreme Court has itself interpreted the state constitution to require a permanent recording of the evidentiary support for a warrant:

> However, regardless of whatever additional information Hallett provided to the judge who issued the warrant, the failure to put that information in writing precludes our consideration of whether it might have cured the insufficient affidavit. This Court has previously construed Article II, Section 11 of the 1972 Montana Constitution to require that all the facts relied upon by the issuing magistrate be included in the sworn affidavit. (citations omitted).Thomas v. Onstad, 36 St. Rep. 910, 594 P.2d 1137, at 1139 (Montana 1979).

cont'd.

clothing, and "any other controband [sic] articles." Ct. File Item 76. The warrant concluded "that there is probable cause to believe that the property described is in or upon the said described real property and 1950 black Dodge pickup." Ibid.

The Sheriff executed these warrants[46] at about 7:30 p.m. that evening. He went to petitioner's residence, told petitioner of Ms. Harding's disappearance, gave petitioner the warnings required by Miranda v. Arizona, 384 U.S. 436 (1966), and described the arrest and search warrants while petitioner was standing outside his house. Ct. File Item 30, Deposition of Sheriff Hammermeister at 52-55. He next put petitioner into the patrol car, "served the Search Warrant and then we started searching." Id. at 55. An exhaustive, four-hour search of petitioner's dwelling was conducted by the Sheriff's deputies, and the Sheriff's Return noted the seizure of 10 items of clothing, a "pen and jack knife," "Pubic hairs of Suspect," "head hairs of suspect," and "1. pickup

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45/ cont'd.

Thus the Montana court's ruling in McKenzie that probable cause to issue a warrant was established by the "combination" of recorded and unrecorded testimony represents a significant departure from state constitutional standards in upholding petitioner's conviction.

46/ Neither the State nor the courts below ever sought to justify the search of petitioner's dwelling and pickup as either a consent search or as a search incident to a lawful arrest. See Brief of the State, State v. McKenzie, Mont. Sup. Ct. No. 13011, at p.15; Order Denying Motion to Suppress (Dec. 3, 1974), Ct. File Item 90; State v. McKenzie I, supra, 557 P.2d at 1034-1036. The "plain view" exception is similarly not applicable to the items seized, since without scientific analysis, it was not apparent that these items were evidence. Coolidge v. New Hampshire, 403 U.S. 443, 466 (1971).

and complete contents." Ct. File Item 76. Of these items, only two (the overshoes and the "blue jean type pants") had been described in the warrant. Two of the undescribed seized items were later introduced at petitioner's trial with significant effect.[47/]

A. The Lack of Probable Cause to Search

The Montana Supreme Court's decision that once "'a probability of criminal conduct . . . [is] shown'", State v. McKenzie III, supra, 608 P.2d at 437 (emphasis omitted), a warrant for the search of a suspect's dwelling is justified clearly presents a significant question for review. Nothing in the affidavit or the oral testimony before the magistrate indicated that any evidence of Ms. Harding's disappearance was to be found within petitioner's dwelling. The magistrate apparently reasoned that because he found probable cause to believe petitioner assaulted her, there was probable cause to believe that evidence of his crime would be found in petitioner's dwelling. Such an inference flies in the face of the Fourth Amendment's historic definition of "probable cause" as meaning reasonable grounds to believe that criminally-related objects are in the place to be searched at the time when the search is authorized to be conducted.

Under prior decisions of this Court, facts presented to the magistrate to authorize the issuance of a warrant to search a dwelling "must be facts so closely related in time to the issue

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47/ These two items were a pair of "red wing boots", T.1062, and a "plaid jacket," T. 2090-2091. The boots were one of the most damning items of evidence which the State introduced, since an expert testified that their soles matched the prints found inside a pair of overshoes, T. 1061-1062, found abandoned near where Ms. Harding's purse was found. These abandoned overshoes had blood and brain tissue on them similar to samples taken from Ms. Harding's body, T. 2140-2147.

of the warrant as to justify a finding of probable cause at that time." Sgro v. United States, 287 U.S. 206, 210 (1932). See also Andresen v. Maryland, 427 U.S. 463, 478 n.9 (1977)(dictum). As this Court noted in Zurcher v. The Stanford Daily, 436 U.S. 547,553 (1978): "[V]alid warrants to search properly may be issued when it is satisfactorily demonstrated to the magistrate that fruits, instrumentalities, or evidence of crime is located on the premises." (emphasis added). While "only the probability . . . of criminal activity is the standard of probable cause" for a search warrant, Spinelli v. United States, 393 U.S. 410, 419 (1969), the officers must demonstrate a connection between this criminal activity and "the premises to be searched", Dumera v. United States, 268 U.S. 435, 441 (1928). What must appear is "'reasonable or probable cause' to believe that [the searching officers] . . . will find the instrumentality of a crime or evidence pertaining to a crime" in the search, Dyke v. Taylor Implement Co., 391 U.S. 216, 228 (1968).[48/]

48/ See Lowery v. United States, 161 F.2d 30, 33 (2d Cir. 1947):

> "probable cause for the issuance of a search warrant necessarily implies, not simply that there are reasonable grounds to believe that some violation of law exists, but that there is a violation in respect to some property located on some premises or on some person -- each of which can be unmistakably identified, so as to be capable of being particularly described in the warrant, from the information in the affidavit."

As this Court has recognized, grounds to arrest do not "necessarily provide the basis for a search of the arrestee's house." Vale v. Louisiana, 399 U.S. 30, 40 (1970)(Black, J., dissenting).[49/] The magistrate, the Trial Judge and the Montana Supreme Court here all made "the unsupportable assumption that if there is probable cause to obtain an arrest warrant the same set of facts also supports probable cause to obtain a search warrant." State v. McKenzie, II, supra, 581 P.2d 1244 (Shea, J., dissenting).

B. The Generality of the Search Warrant

Moreover, even if the search warrant were properly issued, it improperly authorized an unconstitutional general search. The Fourth Amendment's prohibition of warrants not "particularly describing the . . . things to be seized," is directed in "precise and clear" language against the "unbridled authority of a general warrant." Stanford v. Texas, 379 U.S. 476, 481 (1965). A more general warrant than that issued in this case can hardly be conceived. The warrant authorized the seizure

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49/ See United States v. Lucarz, 430 F.2d 1051, 1055 (9th Cir. 1970):

> "[O]f course it cannot follow in all cases, simply from the existence of probable cause to believe a suspect guilty, that there is also probable cause to search his residence. If that were so, there would be no reason to distinguish search warrants from arrest warrants and cases like Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), would make little sense."

See also United States v. Bailey, 458 F.2d 408 (9th Cir. 1972); United States v. Spearman, 532 F.2d 133 (9th Cir. 1976).

of "any . . . controband [sic] articles." That language authorized the searching officers to seize whatever they thought might be relevant as evidence.

Justice Wolfe stated that the "contraband" catch-all was intended to allow the seizure of any evidence "[t]hat the Sheriff felt was pertinent in his investigation and also pertinent to this specific search" and that it authorized him "to take anything he wanted to take that he thought might be related to this case." Deposition of Justice Wolfe, Ct. File Item 30, at p.17. The Sheriff testified that "the wording [of the warrant] says 'and any other contraband' and I figured that covered what we took in the way of evidence and items that we took." Deposition of Sheriff Hammermeister, Ct. File Item 30, at p.73.[50/] The items

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50/ "Q [Defense Counsel] [Could you seize] [a]nything that you wanted to take?
A [Sheriff Hammermeister] Well, if it was relevant to the case.
Q But deemed in your own mind as to whether or not it was relevant?
A Yes.
Q If you thought that the kitchen stove was relevant you would have taken that?
A Yes, if I felt that the stove was -- well, if I felt that I could justify the kitchen stove as relevant to the case, yes.
Q You felt that this would have given you authority to take that, or the radio or TV?
A If it fell into either evidence or contraband.
Q But as you saw it?
A Yes."

Ibid.

seized by the officers were not "contraband" in any meaningful sense of the term;[51] they were simply items of clothing that caught the eye of the searching party. The Sheriff was "not certain what contraband means, but I felt it was evidence." Id. at 68.

What this warrant specifically authorized and what the police here deliberately engaged in and what the Montana Supreme Court explicitly approved of in this case was exactly the kind of "a general, exploratory rummaging in a person's belongings" that was the "specific evil . . . [of] the 'general warrant' abhorred by the colonists." Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971)(plurality opinion), see Andreson v. Maryland, supra, 427 U.S. at 480. Although the Fourth Amendment requires that "[a]s to what is to be taken, nothing is left to the discretion of the officer executing the warrant," Marron v. United States, 275 U.S. 192, 196 (1927), here everything was left to the discretion of the officers to determine on the spot what they decided was "contraband" or "evidence" of the crime of "assault" petitioner had been charged with.

51/ The boots and shirt constituted evidence against petitioner only as the result of microscopic analysis of them which showed that the boots had a small trace of blood on them (T. 1035) and that their soles matched prints inside abandoned overshoes which had blood and brain tissue on them T. 1062. These abandoned overshoes were not found until the day after the seizure of the boots from petitioner's house. T. 2140. The shirt similarly was found to have a trace of blood on it. T. 1205. Sheriff Hammermeister testified that he seized the boots because he thought they matched "footprints at the teacherage on the northwest corner of the school" and he "just had the strongest feeling about them." Deposition of Sheriff Hammermeister, Ct. File Item 30, at pp. 67-68. He similarly testified that he could not "recall" anything unusual about the jacket. Id. at 69.

Only once, in Andreson v. Maryland, supra, has this Court approved language in a warrant approaching the generality of this, and there it did so only because the warrant included a "lengthy list of specified and particular items, all pertaining to" a specific criminal endeavor, 427 U.S. at 480, which made "it clear from the context" what evidence was and insured the warrant "did not authorize . . . a search for evidence of other crimes . . . ." 427 U.S. 481-482. Here the evidence sought was obviously that of a crime other than "assault", and the "context" of the warrant did not confine the sheriff's search to "specified and particular items" but permitted him to range in a general exploration from petitioner's closets to his clothes to the hairs on his body for anything he and the magistrate classed as "contraband". That only two of the thirteen items taken from petitioner's house and person were ultimately used in evidence (see note 47 supra), testifies to the sweeping authority given to, and used by, the sheriff. This kind of unbridled search power cannot be sustained so long as this "Court has not done away with the prohibition against general exploratory searches," State v. McKenzie II, supra, 581 P.2d at 1263 (Shea, J., dissenting), and so long as the principle that "'exploratory searches . . . cannot be undertaken by officers, with or without a warrant'" still stands, ibid., quoting United States v. Rabinowitz, 339 U.S. 56, 70 (1950).

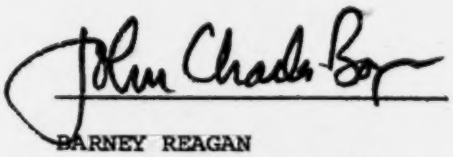
Because "[t]he entire record of this arrest and search and seizure in this case is replete with errors of constitutional dimension," id. at 581 P.2d 1266, this Court should grant certiorari to review it. Under Stone v. Powell, 428 U.S. 465 (1976), no other Court will; and petitioner's life will thus be taken on the basis of fundamental Fourth Amendment errors which the Montana Supreme Court has not chosen to correct.

CONCLUSION

Petitioner prays that the petition for a writ of certiorari be granted.

New York, New York
July 25, 1980

Respectfully submitted,



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